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No. 86-1346 (2)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ROBERT MATCHA AND ANNE MORGAN MATCHA,
Petitioners,

v.

JIM MATTOX, ATTORNEY GENERAL OF TEXAS
ON BEHALF OF THE PEOPLE OF TEXAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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March 23, 1987

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QUESTION PRESENTED FOR REVIEW

Whether a common law migratory boundary of a littoral public easement effects an unconstitutional taking of property when natural erosion moves the boundary in a landward direction.

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JIM MATTOX, ATTORNEY GENERAL OF TEXAS
ON BEHALF OF THE PEOPLE OF TEXAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Jim Mattox, Attorney General of Texas, on behalf of the people of Texas, hereby submits his brief in opposition to the petition for a writ of certiorari, which seeks review of the decision of the Texas Court of Appeals in this case.

OPINION BELOW

The opinion of the Texas Court of Appeals, Third Supreme Judicial District, sitting in Austin, Texas, is reported at 711 S.W.2d 95 (1986). This opinion is reproduced at Petitioners' Appendix, pp. A-8–A-17.

JURISDICTION

Petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. §1257(3). For the reasons set forth below, this Court should exercise its discretionary jurisdiction to deny petitioners' request for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners invoke portions of the Fifth and the Fourteenth Amendments to the United States Constitution, which they set forth at page 6 of their petition. Petitioners also discuss certain provisions of what is commonly referred to as the

"Texas Open Beaches Act," TEX.NAT.RES.CODE ANN. §§61.001 et seq., which petitioners set forth in part at pp. 7-8 of their petition. The act, as it relates to the arguments of both respondent and petitioners, is set forth in Appendix A to this brief.

STATEMENT OF THE CASE

This case is a common law property dispute concerning the boundary of a public easement along the shoreline of West Beach, Galveston Island, Texas. Galveston Island is a barrier island off the Texas mainland along its upper Gulf of Mexico coast. The island was formed in the late Pleistocene Period, when rising sea level caused the Texas shoreline to retreat and partial erosion of the headlands formed sediment that accreted to create a barrier island. The City of Galveston, at least its historical and more densely urbanized portion, occupies the east end of the island, protected from the Gulf of Mexico by a massive seawall. Extending west from the west end of the city seawall to San Luis Pass, a distance of approximately 20 miles, lies that portion of Galveston Island known as "West Beach." West Beach is a more sparsely developed portion of the island, partially subdivided into lots supporting beach houses used primarily as rental properties, vacation homes and retirement homes.

Since at least 1840, the dry beach portion of the Gulf beach along West Beach, i.e. that area between the line of vegetation[1] and the line of mean high tide, has been in private ownership.[2] *Seaway Co. v. Attorney General*, 375 S.W.2d 923, 928 (Tex.App.—1964, writ ref'd n.r.e.). However, since before 1840, the general public has freely used the privately-owned dry sand beach along West Beach as a public road and for

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1. The "line of vegetation" is generally understood to be the landward boundary of the natural and legal beach. It is defined as "the extreme seaward boundary of natural vegetation which spreads continuously inland." TEX.NAT.RES.CODE ANN. §61.001(2).

2. In 1840 the littoral uplands along West Beach were patented out of the Republic of Texas to Edward Hall and Levi Jones. The "wet beach", that portion of the beach seaward from the mean high tide to the mean low tide, was retained and is today part of the State of Texas' submerged lands.

numerous recreational activities. *See Seaway Co. v. Attorney General, id.* at 931-939. Public use of West Beach has been bounded by the vegetation line on the landward side and the shoreline, or water's edge, on the seaward side. This longstanding public use has ripened under Texas common law into an easement or right of use and access over the privately-owned dry sand beach along West Beach. *Matcha v. Mattox,* 711 S.W.2d 95 (Tex.App.—1986, writ ref'd n.r.e.); *Feinman v. State,* 717 S.W.2d 106 (Tex.App.—1986, writ ref'd n.r.e.); *Seaway Co. v. Attorney General, supra.*

Characteristic of their barrier island heritage, both the vegetation line and the shoreline on West Beach are dynamic. On a daily basis, the beach widens and narrows with the fluctuations of the tides. After erosive storms,[3] the beach widens as a result of vegetation line erosion and gradually narrows between storms as vegetation colonizes seaward. Over a longer period of time, the beach corridor itself on West Beach has migrated in a landward direction, i.e. has eroded, as both the vegetation line and the shoreline have lost ground on a net basis over the course of many storms and seasonal fluctuations. The foreseeable trend on West Beach calls for continued net erosion, owing to the combined influences of sediment supply deficit, sea level rise, and storms.

These historical movements of the beach have been attended by free and unobstructed public use of West Beach. The public has freely used the beach landward to the vegetation line at all times: before storms, after storms, and in between storms. The longstanding community understanding about the use of the area seaward of the vegetation line was that the public always had a right to be there. *Matcha v. Mattox,* 711 S.W.2d at 99; *Feinman v. State,* 717 S.W.2d at 111-114.

Against this backdrop, petitioners entered the scene in 1982, when they purchased a beachfront property, unimproved Lot 60, Sea Isle Subdivision, on West Beach. Later that year they had a house built on the lot, facing the Gulf of Mexico. The

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3. Approximately 50 hurricanes and tropical cyclones have affected Galveston Island since 1900, most notably the unnamed hurricane of 1900 which established itself as the worst natural disaster in United States history after leaving 6000 island residents dead or missing in its wake.

structure was erected just landward of the then-existing location of the vegetation line. The petitioners operated this structure as a rental property.

The following summer Hurricane Alicia made landfall on West Beach, all but destroying petitioners' structure, removing approximately four feet of elevation from their lot, and considerably eroding the vegetation line all along West Beach. In the vicinity including petitioners' lot, the vegetation line eroded over 100 feet landward from its pre-storm position, leaving the remains of petitioners' structure on the bare sand beach entirely seaward of the vegetation line.

Over respondent's objection, petitioners proceeded to reconstruct their structure. Respondent filed suit in Travis County, Texas, district court and obtained temporary orders prohibiting petitioners from continuing with reconstruction. (*See* Petitioners' Appendix, pp. A-19–A-29.) Suit was brought by respondent under authority provided in Section 61.018 of what is commonly known as the "Texas Open Beaches Act," TEX.NAT.RES.CODE ANN. §§61.001-61.025. This statute, adopted in 1959, authorizes the Attorney General, or certain other designated public attorneys, to protect the public's beach easement from encroachment. Texas courts have held that the act neither creates nor acquires any public beach rights but only recognizes those rights on the privately-owned dry beach which have been perfected by the public at common law. *See* Section 61.012; *State v. Markle,* 363 S.W.2d 332, 336 (Tex.App.—1962, no writ); *Moody v. White,* 593 S.W.2d 372, 377 (Tex.App.—1979, no writ).

Between the winter of 1983 and before trial, the petitioners hauled in sand and with it built a wall on the dry beach seaward of their structure, filled in their Lot 60, and planted their property and adjacent areas with sprigs of grass which they then watered and fertilized. By trial, this artificially induced vegetation surrounded petitioners' lot and extended seaward of it. At time of trial, the naturally located vegetation line remained essentially unchanged in position from the time of hurricane landfall, approximately one year prior.

Upon trial, the district court entered a directed verdict finding that the public had acquired an easement for free and unobstructed use and access to the beach from the natural vegetation line seaward to the line of low tide, based upon common law custom, implied dedication, and prescription. Further, the court concluded that this public easement is migratory, moving with the natural movements of its boundaries, the vegetation line and the low water's edge. Thus, finding that petitioners' structure and plantings obstructed the public easement seaward of the natural vegetation line, the district court ordered them removed and prohibited any construction or reconstruction seaward of the natural line of vegetation.

Petitioners appealed to the Texas Court of Appeals, Third Supreme Judicial District, sitting in Austin, which affirmed the judgment of the trial court upon the common law doctrine of custom. The court of appeals overruled petitioners' point of error asserting that the district court judgment effected an unconstitutional taking of their property without just compensation. The court in its opinion simply noted that the easement was acquired not by virtue of the Open Beaches Act but instead through common law. 711 S.W.2d at 101. The Supreme Court of Texas denied petitioners' application for a writ of error, with the notation "no reversible error." Thereupon, petitioners applied to this Court for a writ of certiorari.

SUMMARY OF ARGUMENT

The petition for writ of certiorari raises no substantial federal question. The naturally migratory public beach easement adjudicated below derives from state common law, particularly the real property doctrines of custom, implied dedication and prescription. No basis exists for substituting any federal common law or a federal rule of decision for state law to define the nature of this property right.

Neither does adjudication of this property right raise any substantial question of a "taking" of property in violation of the Fifth Amendment to the United States Constitution. As found below, the migratory nature of the public easement is an integral part of the historic custom and usage which created the easement itself. 711 S.W.2d at 98-100. Moreover,

Texas coastal property law provides for a migratory title boundary at the shoreline. *State v. Balli*, 190 S.W.2d 71 (Tex. 1944), *cert. denied*, 328 U.S. 852 (1946). A migratory easement boundary along the dry beach is but a physical and legal adjunct to migratory title boundary along the wet beach. *Matcha v. Mattox*, 711 S.W.2d at 100; *Feinman v. State*, 717 S.W.2d at 110.

Required departure from the migrating vegetation line as the landward boundary of the West Beach easement would engender confusion, inequity, and subsequent loss of the easement itself. By visibly delineating the landward extent of the physical beach, the natural line of vegetation has always functioned as a convenient, readily discernible marker of the landward limit of the "legal," public beach as well. Departure from a current, visible line of vegetation would unnecessarily render the daily location of the public use boundary pure guesswork. *Feinman v. State*, 717 S.W.2d at 111.

Requiring either a fixed or an accretionary-only public easement would eliminate the natural equities built into the common law of migratory coastal boundaries. Under the established Texas law of accretion and erosion, a littoral owner may either gain coastal property or lose it as natural events move the shoreline landward and seaward. By accepting a migrating boundary only in the event of accretion, petitioners obtain all the benefit and risk none of the burden of coastal property ownership. Alternatively, a static beach easement, also advocated by petitioners, will result in its loss either under the waves of the Gulf of Mexico—as the beach erodes—or under the advancing vegetation of the littoral upland—as the beach accretes.

Petitioners' view of the Takings Clause would convert every state common law accretion, erosion, and avulsion case into a compensable federal claim. In coastal jurisdictions where sea level rise and coastal erosion are looming problems, it is fiscally untenable for state and local governments to follow the landward drift of the shoreline with constitutionally required compensation.

REASONS THE WRIT SHOULD BE DENIED

I.

Adjudication of the common law public beach easement on West Beach, Galveston Island raises no substantial or important federal question.

A.

The public beach easement complained of by petitioners derives from the Texas common law of property rights along its dynamic Gulf of Mexico coast. As a product of state property law, neither the creation of the public beach easement nor its migratory nature raises a federal question.

The trial court below found that the public enjoys a migratory easement for unobstructed passage and recreation on the "dry beach" portion of West Beach under three separate state common law doctrines: custom, implied dedication, and prescriptive right. On the basis of custom, the court of appeals affirmed.[4] *Matcha v. Mattox*, 711 S.W.2d at 98. The court of appeals noted that there was no doubt that the longstanding public use of the dry beach had given rise to the public's easement under the ancient doctrine of custom. *Id.* at 99. Further, the ambulatory nature of the public easement was viewed as particularly "... compatible with the doctrine of custom and the situations that often give rise to a custom." *Id.* at 100. By its refusal of the petitioners' application for a writ of error, the Supreme Court of Texas found no reversible error with this assessment of common law property rights on West Beach.

No basis exists for invoking or substituting any federal law principles to define the coastal property rights herein, as was done, for example, in *California, ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1982) or in *Hughes v. Washington*, 389 U.S. 290 (1967). Petitioners point to no

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4. The public easement on West Beach has also been upheld on the basis of implied dedication, *Feinman v. State, supra*, and prescription, *Seaway Co. v. Attorney General, supra.*

incident of title or fact situation calling for a determination under federal common law. Petitioners' title to Lot 60 in Sea Isle Subdivision does not trace back to any United States patent or grant. Rather, the chain of title runs back to an 1840 patent out of the Republic of Texas to private individuals, with no intervening ownership or possession by the United States Government. Neither does the easement boundary disputed herein, the natural line of vegetation, demark any interstate or international boundary, thereby triggering possible federal concerns. Thus, Texas law controls the determination of the public beach easement on West Beach of Galveston Island. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Borax Consolidated, Ltd, v. Los Angeles*, 296 U.S. 10, 22 (1935). As adjudicated under this law, an easement exists on West Beach under the common law of custom and migrates with the natural fluctuations of its monuments: the vegetation line and the low tide line.

B.

Petitioners assert one federal basis in their attack on the migratory nature of the West Beach public easement. Characterizing the court adjudication below as "regulatory" activity brought about by the "state action" of the Texas Attorney General, petitioners claim a naturally migratory easement constitutes a "taking" of property without just compensation in violation of the Fifth Amendment to the United States Constitution, as applied to the states under the Fourteenth Amendment. The question thus becomes whether the migratory, common law boundary of the public easement on West Beach effects an unconstitutional "taking" when nature moves the boundary landward.[5] Respondent submits that to pose the question thusly is to answer it, for court application of state common law property principles, especially governing coastal boundaries, does not constitute an unconstitutional taking.

Neither the creation of the public beach easement nor its dynamic nature unconstitutionally take property. The common

5. Petitioners, inaccurately, frame the question in terms of a regulatory action of the State of Texas pursuant to its police power.

law principles upon which the public beach right in Texas rests—custom, implied dedication, and prescription—are the legally recognized means by which individuals may indeed gain rights in another's property without the requirement of compensation. Thus Texas courts have given little credence to arguments that judicial recognition of the existence of the easement offends constitutional prohibitions against governmental takings without compensation.[6] *See: Matcha v. Mattox,* 711 S.W.2d at 101; *Seaway Co. v. Attorney General,* 375 S.W.2d at 930; *Moody v. White,* 593 S.W.2d at 379-380. *See also United States v. St. Thomas Beach Resorts, Inc.,* 386 F. Supp. 769, 772 (D. V.I. 1974), *aff'd mem.,* 529 F.2d 513 (3d Cir. 1975) (applying the Virgin Islands Open Shoreline Act, similarly worded to the Texas Open Beaches Act).

The natural amenability of the beach easement to shorefront dynamics is inherent in the common law creation of the right, at least regarding the West Beach easement. The undisputed evidence at trial established that, for 150 years, the public has freely used and littoral property owners have freely made available all of the privately-owned dry sand beach landward to the natural line of vegetation, whatever the location of the vegetation line at any point in time, regardless of storms. The very custom itself on West Beach has embodied the notion of a migratory public use boundary that corresponds with the natural monuments of the beach.

In this sense a migratory coastal *easement* boundary is no different legally than a migratory coastal *title* boundary. Texas adopts the familiar coastal property rule whereby the title boundary, the line of mean high tide, is subject to movement with the natural processes of erosion and accretion. Thus loss of privately-owned littoral uplands to state-owned submerged lands beneath the sweep of the tide is simply a noncompensable loss to the littoral property owner. *State v. Balli,* 190 S.W.2d 71 (1944), *cert. denied,* 328 U.S. 852 (1946); *City of Corpus Christi v. Davis,* 622 S.W.2d 640 (Tex.App.—1981, writ ref'd n.r.e.); *Lakefront Trust, Inc. v. City of Port Arthur,* 505 S.W.2d 606 (Tex.App.—1974, writ ref'd n.r.e.). *Accord*

6. Petitioners contend that Texas courts have declined to address this issue. To the contrary, the taking issue has been met and dispatched as without merit.

County of Hawaii v. Sotomura, 517 P.2d 57 (Hawaii 1973) (reversing even a token award of $1 as compensation for 1.120 acres of shorefront uplands lost to the Pacific Ocean by erosion). Under Texas law, the movement of the public beach easement boundary is a legal parallel to the movement of the title boundary.

In order to raise a federal takings issue, petitioners depict the trial court judgment below as a "regulatory" activity resulting from the "state action" of the Attorney General under the Texas Open Beaches Act. This characterization is both inaccurate and unhelpful. The West Beach public easement at issue is not the product of any exercise of the police power. Rather, it is a result of many decades of public use in satisfaction of the common law elements in the doctrines of custom, implied dedication, and prescription. The Open Beaches Act itself did not create this public beach right or its migratory nature; the act merely recognizes whatever rights the public may have perfected and provides an enforcement mechanism for these rights through governmental attorneys. *State v. Markle*, 363 S.W.2d 332, 336 (Tex.App.—1962, no writ). "There is nothing in the act which seeks to take rights from an owner of land." *Seaway Co. v. Attorney General*, 375 S.W.2d at 930.

The Attorney General or the State of Texas appears in open beach cases only as a nominal party. The real party in interest is the public itself in the strictest sense. Indeed, given requisite standing, any member of the public could bring suit in state court to enjoin or remove encroachments to the public's easement on West Beach. Simply put, it is the public's easement rather than the state's.

Petitioners compound the inaccuracy by attempting to pigeonhole the West Beach public easement into the regulatory takings category represented by the authorities cited in part II of their petition. These cases analyze whether legislation or administrative regulation, in pursuit of albeit legitimate police power objectives, has been so excessive as to effect a *de facto* taking of property interests without compensation. As explained, the public easement on West Beach derives not from government regulation but from application of common law prop-

erty principles. Petitioners' authorities are inapposite.[7]

One coastal case cited by petitioners concerning a barrier beach is distinguishable. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court held that the U.S. Army Corps of Engineers could not, without compensation, impose the federal navigational servitude for public access over a private marina situated on a Hawaiian "fish pond" segregated from the public waters of the Pacific Ocean by a barrier beach. This Court reasoned that this area was not legitimately within a publicly navigable waterway traditionally subject to the servitude. Significant in this Court's holding was that the marina occupied an area considered private under longstanding Hawaii colonial and state law, now connected to the Pacific only by an artificial channel dug out from the marina with the consent of the Federal Government itself. By contrast, through their own acts of purchasing and improving property at the very edge of the sea, petitioners find themselves within the natural boundaries of the beach and in an area historically deemed public domain under longstanding Texas custom and usage.

For these reasons, petitioners cannot properly present a federal question of substance or import arising from the common law property dispute adjudicated below.

II.

Departure from the natural line of vegetation as the landward boundary of the public easement on West Beach would cause confusion, inequity, and eventual loss of the easement.

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7. On the same basis, another beach-related, Takings Clause case currently before this Court has no bearing on this instant petition. In *Nollan v. California Coastal Commission*, No. 86-133, provision of public beach access was imposed by the state coastal development regulatory agency as a condition for granting a permit to enlarge a beachfront house. The source of this beach access requirement was the state's police power invoked to promote development control objectives, not the state's common law and any particular public right perfected thereunder. Whatever the disposition of *Nollan*, it will neither control nor affect petitioner's case.

A.

Petitioners invoke the Fifth Amendment to invalidate any post-Alicia location of the vegetation line as the landward boundary of the West Beach public easement. Petitioners would apparently have the public and littoral property owners continue to hew to the pre-storm location of the vegetation line, albeit invisible. Obviously, such a result would lead to confusion as to the boundary of the public beach.

The very basis of the vegetation line's ripening into the landward boundary of the beach easement is that this natural monument has always visibly defined the physical beach. To the typical beachgoer on West Beach, the "legal" beach has always coincided with the natural beach, that area from the water's edge landward to the line of dense vegetation growth on the upland. Public use, and landowner acceptance of it, was confined to that area, visibly delineated by nature. Thus the legal boundaries of the public beach, by longstanding custom and usage, became boundaries precisely because they were "written on the soil." For a typical beachgoer visiting the beach without aid of surveying sextant and historical records, petitioners' advocated abandonment of the visible natural vegetation line would make the location of the public beach easement pure guesswork. *Feinman v. State,* 717 S.W.2d at 111.

B.

Petitioners also invoke the Fifth Amendment to eliminate the natural equity inherent in the common law rule of migratory coastal boundaries. As mentioned previously, under Texas law, littoral title shifts landward and seaward with the natural movements of the line of mean high tide. Thus property purchasers assume the risk of either property loss or property gain when investing in real estate at the edge of the Gulf of Mexico. The migratory easement, like migratory title, incorporates both risks. If the upland owner buys property and the beach accretes, nature shifts the public easement seaward and the littoral owner gains. If the owner buys property and the beach erodes, nature shifts the public easement landward and the littoral owner loses. This legal mirroring of natural processes im-

plements what is common sense and intuitive: it is unrealistic to rely on stability at the edge of a barrier beach. Somehow, petitioners construe the Fifth Amendment to entitle them to risk only the potential for benefit but never for loss on the dynamic shorefront of West Beach.

This potential for gain through natural accretion and seaward movement of vegetation mitigates petitioners' claim of "no remaining economic value or residual market value in their land."[8] It is possible that the vegetation line may advance sufficiently seaward in post-Alicia recovery to render petitioners' Lot 60 more fully marketable or "buildable," at least until the next storm or storms leaves the lot on the bare sand beach beyond the range of any natural post-storm recovery. Indeed, petitioners themselves validate this hopeful scenario by their description of Alicia's impact as a "temporary disruption" and their contentions of a recovered or recovering vegetation line.

By their taking claim, petitioners suggest some constitutional-level inequity in an easement boundary which legally migrates by virtue of sudden storms and hurricanes as well as by slower forms of coastal erosion. However, coastal storm events cannot with scientific defensibility be separated from the complex matrix of factors influencing the long-term erosion of a littoral, barrier beach such as West Beach. Hurricanes and storms, as common visitors to the Gulf Coast of Texas, simply represent one end of a continuous spectrum of wind and wave activity constantly shaping Texas' shores. *See City of Corpus Christi v. Davis,* 622 S.W.2d at 646. As a part of life on the Texas Gulf Coast, storms are an inherent risk of coastal property ownership.

C.

The loss of the migratory character of the West Beach easement would spell the loss of the easement itself. On an eroding beach both the vegetation and the low tide line, the historical boundaries of the natural beach, are by definition moving land-

8. Petitioners made no evidentiary showing of the economic value or market value of their property at trial below. This assertion at page 19 of their petition is speculative.

ward over time. A legally migratory public easement preserves the historical public rights perfected between these two dynamic lines. On the other hand, the static or fixed easement advocated by petitioners will eventually disappear beneath the encroaching waves of the Gulf. *Feinman v. State*, 717 S.W.2d at 111.

Conversely, in an accreting area, a static easement will effectively narrow or disappear, as encroaching vegetation consumes it from the landward side of the easement. Moreover, the easement will become physically separated from the Gulf of Mexico. Accreting sand on the seaward side of the easement will shift the high tide line seaward. Texas common law will deliver title to this accretion to the upland owner. However, since this accreted title will be unencumbered with the stationary easement, a strip of privately-owned sand will separate the public easement from the water. Thus under petitioners' view the public would retain an easement situated in densely vegetated uplands and detached from the sea, which serves nobody's purpose and departs from the historical custom and usage of the Gulf Coast beachfront. By contrast, the naturally migratory easement recognized by the court of appeals below automatically adjusts public rights seaward to follow the natural location of the traditional beach.

D.

If petitioners prevail, the public would be required either to repeatedly buy back the beach as it migrates landward over time through erosion or to lose the public easement, and on West Beach 150 years of custom, to the encroaching waters of the Gulf of Mexico. To be logically consistent, the petitioners would also be entitled to compensation when and if the line of mean high tide finally moves upon their Lot 60 and the State of Texas claims ownership under its longstanding common law rule of migratory coastal title. Indeed, petitioners' position holds the potential for converting every littoral or riparian case involving erosion or accretion and public lands into a Takings Clause case. The demand on the public treasury for a constant, constitutionally required purchase and repurchasing of public rights along public waterways is obvious and considerable.

The implications extend far beyond Texas' shores. Many

other parts of the United States coast are similarly experiencing erosion, particularly the barrier beaches of the Atlantic Ocean, where the much publicized, world-wide rise in sea level exerts dramatic influence on gently sloping shorelines. Petitioners' reading of the Constitution to require the public to pay them for the natural consequences of shoreline erosion is literally, as well as legally, unnatural.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Texas Open Beaches Act

TEX.NAT.RES.CODE ANN. §§61.001-61.024

Section 61.001. Definitions

In this chapter:

(1) "Department" means the Parks and Wildlife Department.

(2) "Line of vegetation" means the extreme seaward boundary of natural vegetation which spreads continuously inland.

(3) "Highest wave" means the highest swell of the surf with such regularity that vegetation cannot grow and does not refer to the extraordinary waves which temporarily extend above the line of vegetation during storms and hurricanes.

(4) "Littoral owner" means the owner of land adjacent to the shore and includes anyone acting under the littoral owner's authority.

(5) "Public beach" means any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.

§ 61.011. Public Policy

It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the

state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.

§ 61.012. Definition

In this subchapter, "beach" means state-owned beaches to which the public has the right of ingress and egress bordering on the seaward shore of the Gulf of Mexico or any larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico if the public has acquired a right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

§ 61.013. Prohibition of Obstructions

(a) It is an offense against the public policy of this state for any person to create, erect, or construct any obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public, individually and collectively:

(1) to enter or to leave any public beach; or

(2) to use lawfully and legally any public beach or any larger area abutting on or contiguous to a public beach if the public has acquired a right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

(b) For purposes of this section, "public beach" shall mean any beach bordering on the Gulf of Mexico which extends inland from the line of mean low tide to the natural line of vegetation bordering on the seaward shore of the Gulf of Mexico, or such larger contiguous area to which the public has acquired a right of use or easement to or over by prescription, dedication, or estoppel, or has retained a right by virtue of continuous

right in the public since time immemorial as recognized by law or custom. This definition does not include a beach which is not accessible by a public road or public ferry.

(c) A person who creates, erects, or constructs an obstruction, barrier, or restraint in violation of Subsection (a) of this section is liable to the state for a civil penalty of not less than $50 nor more than $1,000.

§ 61.014. Denial of Access by Posting

(a) As used in this section, "public beach" means the area extending from the line of mean low tide of the Gulf of Mexico to the line of vegetation bordering on the Gulf of Mexico, or to a line 200 feet inland from the line of mean low tide, whichever is nearer the line of mean low tide, if the public has acquired a right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

(b) Any person who displays or causes to be displayed on any public beach any sign, marker, or warning, or who shall make or have made any written or oral communication which states that the public beach is private property or who states in any other manner that the public does not have the right of access to the public beach in violation of the lawful access rights of the public guaranteed by this subchapter is liable to the state for a civil penalty of not less than $50 nor more than $1,000.

(c) Each day that the communication is made constitutes a separate offense.

(d) Any person who violates the provisions of this section shall be prosecuted in the county in which the public beach is located.

(e) This section does not apply to any island or peninsula that is not accessible by public road or common carrier ferry facility so long as the condition exists.

§ 61.015. Satisfaction of Ingress and Egress Requirement

The requirement of free and unrestricted right of ingress and egress over an area landward of the line of vegetation is considered fully satisfied by access roads or ways which are in existence now and available to the public or which by or with the approval of any governmental authority having jurisdiction may be provided in the future.

§61.016. Boundaries for Areas With No Marked Vegetation Line

(a) To determine the elevation reached by the highest waves of the Gulf of Mexico, in any area in which there is no clearly marked vegetation line (for instance, a line immediately behind well-defined dunes or mounds of sand and at a point where vegetation begins) recourse shall be to the nearest clearly marked line of vegetation on each side of the unmarked area.

(b) The "line of vegetation" for the unmarked area shall be the line of constant elevation connecting the two clearly marked lines of vegetation on each side.

(c) If the elevation of the two points on each side of the area are not the same, the extension defining the line reached by the highest waves of the Gulf shall be the average elevation as between the two points, but if there is no clearly marked line of vegetation, the extended line shall not extend inland further than 200 feet from the seaward line of mean low tide.

§61.017. Line of Vegetation Unaffected by Certain Conditions

(a) The "line of vegetation" is not affected by the occasional sprigs of salt grass on mounds and dunes or seaward from them and by artificial fill, the addition or removal of turf, or by other artificial changes in the natural vegetation of the area.

(b) If the changes listed in Subsection (a) of this section are made and the vegetation line is obliterated or is created artificially, the line of vegetation shall be determined in the same manner as in those areas covered by Section 61.016 of this code, but if there is a vegetation line consistently following a line more than 200 feet from the seaward line of mean low tide, the

200-foot line shall constitute the landward boundary of the area subject to public easement until a final court adjudication establishes the line in another place.

§ 61.018. Suit to Remove Obstructions

(a) The attorney general or any county attorney, district attorney, or criminal district attorney shall file in a district court of Travis County, or in the county in which the property is located, a suit to obtain either a temporary or permanent court order or injunction to remove any obstruction or barrier or to prohibit any restraint or interference which restricts the right of the public, individually or collectively, to free and unrestricted ingress and egress to and from any area described in Section 61.012 of this code or any property abutting on or contiguous to the state-owned beach on which the public has acquired a prescriptive right.

(b) In the same suit, the attorney general, county attorney, district attorney, or criminal district attorney may seek recovery of the costs of removing any obstruction or barrier if it is removed by public authorities pursuant to an order of the court.

§ 61.019. Declaratory Judgment Suits

(a) A littoral owner whose rights are determined or affected by this subchapter may bring suit for a declaratory judgment against the state to try the issue or issues.

(b) Service of citation on the state shall be made by serving the citation on the attorney general.

§ 61.020. Prima Facie Evidence

In a suit brought or defended under this subchapter or whose determination is affected by this subchapter, a showing that the area in question is located in the area from mean low tide to the line of vegetation is prima facie evidence that:

(1) the title of the littoral owner does not include the right to prevent the public from using the area

for ingress and egress to the sea; and

(2) there is imposed on the area, subject to proof of easement, a prescriptive right or easement in favor of the public for ingress or egress to the sea.

§ 61.021. Area Not Covered by Subchapter

None of the provisions of this subchapter apply to beaches on islands or peninsulas that are not accessible by a public road or ferry facility for as long as the condition exits.

§ 61.022. Exemption for Certain Structures

The provisions of this subchapter do not prevent any agency, department, institution, subdivision, or instrumentality of this state or of the federal government from erecting or maintaining any groin, seawall, barrier, pass, channel, jetty, or other structure as an aid to navigation, protection of the shore, fishing, safety, or other lawful purpose authorized by the constitution or laws of this state or the United States.

§ 61.023. Effect on Land Titles and Property Adjacent to and on Beaches

The provisions of this subchapter shall not be construed as affecting in any way the title of the owners of land adjacent to any state-owned beach bordering on the seaward shore of the Gulf of Mexico or to the continuation of fences for the retention of livestock across sections of beach which are not accessible to motor vehicle traffic by public road or by beach.

§ 61.024. Effect of Subchapter on Definition of Public Beach

None of the provisions of this subchapter shall reduce, limit, construct [sic], or vitiate the definition of public beaches which has been defined from time immemorial in law and custom.